

1513941 (Migration) [2016] AATA 4607 (2 November 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Miss Yoon-Mi Kim

CASE NUMBER: 1513941

DIBP REFERENCE(S): BCC2014/1969409

MEMBER: Suzanne Carlton

DATE: 2 November 2016

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations;
- cl.820.221 of Schedule 2 to the Regulations; and
- r.2.03A.
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Statement made on 02 November 2016 at 3:21pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 9 October 2015 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 11 August 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) and r.2.03A because the delegate was not satisfied that the parties, at the time of application, had been in a de facto relationship for at least 12 months prior or that there were compelling and compassionate circumstances for the grant of the visa notwithstanding the length of the relationship.
4. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. The issue in the present case is whether the parties were, at the time of application, in a genuine and continuing de facto relationship and whether they had been in that relationship for at least the 12 months prior to making the application. If they had not been in that relationship for at least the 12 months prior, a secondary issue is whether there are compelling and compassionate circumstances for the grant of the visa.
6. The review applicant is a 34-year-old British woman of South Korean descent. She has never previously been in a de facto or de jure spousal relationship.
7. The sponsor is a 39-year-old Australian man. He was previously in a relationship between 2005 and 2007. There is one child of that earlier relationship, Jasmine, who is now 11 years old.
8. The parties claimed to have met online in 2012, but did not meet in person until April 2013 when the review applicant visited the sponsor in Perth. On that occasion, the review applicant was onshore for two weeks.
9. Subsequent to that visit, the review applicant returned to Australia in December 2013 staying just over two weeks and in February 2014 staying just under three months.
10. When the review applicant left Australia in May 2014 she was accompanied by the sponsor. The two return together four days later.
11. The review applicant left Australia for four days in July 2014 before making the application for this visa.

SPOUSE/DE FACTO (cl.820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl.820.221)

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

12. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

13. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
14. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
15. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship, including joint ownership of assets, and joint liabilities; the extent of any pooling of financial resources, any legal obligations owed to the other party; and any sharing of day-to-day household expenses.
16. The parties have provided evidence of joint utility accounts which are addressed to their claimed joint residence. Those accounts date from 2016. Additionally the parties have provided bank statements dating back to January 2014.
17. As this application was lodged in August 2014 I am obliged to consider the nature of the parties' finances as at August 2013. There is before me scant evidence of any intermingled finances or shared household expenses as at August 2013.
18. The Tribunal has had regard to the evidence provided relating to the nature of the parties' household, including any joint responsibility for the care and support of children, the parties' living arrangements; and any sharing of housework.
19. The evidence before me indicates the parties had been living together at their current address since the applicant's relocation to Australia. They have provided declaratory evidence relating to how they share house work and the care of the sponsor's child.
20. Looking however at the 12 months prior to the making of the application, I note that in that period, the parties were only together, in the same country, for just under four of the 12 months.
21. The Tribunal has had regard to the evidence provided relating to the social aspects of the relationship, including whether the parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

22. The parties have provided evidence of joint travel, photographic evidence as well as sworn declaratory evidence from friends and family as to the genuine and continuing nature of the relationship. Much of this evidence supports the parties' claim that they have been in a relationship since 2012 but it does not directly support the proposition that the relationship the parties have been in is one of a de facto nature.
23. The Tribunal has had regard to the evidence provided relating to the nature of persons' commitment to each other, including the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
24. The Tribunal accepts, on the evidence before it, that the parties have known each other since late 2012 online and that the nature of that online relationship was romantic. The Tribunal also accepts, on the evidence before it, that the parties first met in person in April 2013 and that the relationship has developed since then. However, the Tribunal is not satisfied that the parties were in a de facto relationship in August 2013 or at any time prior to that.
25. The Tribunal is satisfied that at the time of application and at the time of decision, the parties evidenced a mutual commitment to a shared life to the exclusion of others and that they live together. The Tribunal is satisfied that the parties are in a genuine and continuing relationship and were, at the time of application and are, at the time of decision and that the nature of the relationship at those relevant times was of a de facto nature.
26. The Tribunal is also satisfied that the parties are not related by family.
27. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time of application and at the time of decision.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

28. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. These are: that the couple are both at least 18 years of age; and with limited exceptions, that the applicant has been in the de facto relationship for at least the period of 12 months ending immediately before the date of the application, unless he or she can establish compelling and compassionate circumstances for the grant of the visa. The requirement that the relationship existed for 12 months prior to the application does not apply in certain circumstances where the sponsor is or was a humanitarian visa holder, or for applications made on or after 9 November 2009, where the de facto relationship has been registered under a relevant State or Territory law: r.2.03(4), (5).
29. The Tribunal accepts that the parties were at the time of application, at least 18 years old. However, for the reasons set out above, the Tribunal is not satisfied that the claimed de facto relationship had existed for at least the 12 months prior to the visa application being lodged.
30. Accordingly, the Tribunal turns to consider whether the applicant has established compelling and compassionate circumstances for the grant of the visa notwithstanding that the parties had not been in a de facto relationship for the 12 months prior to the time of application.
31. The Tribunal considers that the de facto relationship began, at its earliest, in December 2013 when the applicant arrived in Australia whilst on a one-year visitor visa. In her application, the review applicant noted that she began living with the sponsor in February 2014 and that the application was made in order that they could continue living together when her one-year visitor visa expired. At the time of application, the parties were then in a de facto relationship for about eight months.

32. I accept the declaratory evidence before me that the sponsor has shared responsibility for his daughter with his former partner and that responsibility is that Jasmine stays with the sponsor and the review applicant every other week. I also accept that the sponsor works as a full-time police officer and that he does shift work. I accept that the nature of the sponsor's work means that the review applicant is responsible for childcare, the school run, and meal preparation while Jasmine is at their home. I accept that she has arranged her schedule in order to meet these responsibilities. I also accept that in the past three years, the relationship between the review applicant and Jasmine has developed. Given this evidence, I find that there are compelling and compassionate circumstances for the grant of the visa.
33. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
34. The applicant also meets cl.820.211(2)(a) and cl.820.221.
35. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

36. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211 of Schedule 2 to the Regulations;
 - cl.820.221 of Schedule 2 to the Regulations; and
 - r.2.03A.

Suzanne Carlton
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).